Campaign Finance Regulation: Faulty Assumptions and Undemocratic Consequences

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This selection was originally published as Cato Policy Analysis no. 238, September 13, 1995. Bradley A. Smith, an associate professor at Capital University Law School in Columbus, Ohio, provides an enlightening overview of the history of the financing of political campaigns in the United States. He also presents a useful summary of the current limitations on federal contributions and expenditures.

Smith finds that campaign finance regulation has had a detrimental effect on the electoral process contradictory to its stated purposes. This is because it has been based, as are proposals for further "reform," on false assumptions.

Smith's conclusion is that deregulation is a more appropriate way to achieve the objectives of reform than is further regulation. Cato Institute's web site is www.cato.org.

Efforts to control political campaign spending have met with little ideological resistance since the turn of the century, and efforts over the past twenty-five years to reform campaign finance, primarily by limiting contributions to and spending by campaigns, have been exceptionally popular.

However, despite its popularity, there is no serious evidence that campaign finance regulation has actually accomplished any of the goals set out for it by its supporters. Rather, continued support for campaign finance reform by groups such as Common Cause seems to stem more from habit than from any serious argument that those reforms already enacted are working or that proposed reforms might meet their stated goals. In fact, efforts to regulate campaign finance have been little short of disastrous. They have distorted the political process, hindered grass-roots political involvement, infringed on First Amendment rights, and helped to entrench incumbents in office while doing nothing to address the allegedly corrupting influence of money in politics.

This paper examines the fundamental assumptions behind campaign finance reform efforts and finds them largely flawed.[1] Because these assumptions are flawed, campaign finance reform will not achieve the objectives set out for it and, in fact, has already had a detrimental effect on the electoral process. Rather than continue down the path of greater government regulation, the country would be best served by deregulating the electoral process, as intended by the drafters of the Constitution.

THE STRUCTURE OF CAMPAIGN FINANCE REGULATION

The first state laws regulating campaign finance were passed in the latter part of the nineteenth century. These laws were typically limited to minimal disclosure requirements of campaign donations and expenditures, although four states also banned all corporate contributions beginning in 1897.The first federal law, a narrow provision banning some corporate contributions, was passed in 1907. Over the next six decades, the federal government passed several laws requiring disclosure of contributions and the filing of reports, but these laws remained generally toothless and were largely ignored. Only with passage of the Federal Election Campaign Act in 1971 and, more important, the 1974 amendments to FECA, did campaign finance regulation become a significant factor on the American political landscape.[2]

THE FEDERAL ELECTION CAMPAIGN ACT

The 1974 amendments to FECA constituted the first effort to establish a comprehensive, national system of campaign finance regulation. Spe-

1. For purposes of this paper we focus primarily on regulation of federal campaigns, recognizing that many states have adopted similar regulatory schemes with similar bad effects. These state laws share the assumptions and basic structure of the federal regime.

2. Robert E. Mutch, *Campaigns, Congress, and Courts: The Makings of Federal Campaign Finance Law* (New York: Praeger, 1988), pp. xvii, 7–42.

cifically, the amendments established the following framework of contribution and spending limits for federal campaign finance:

- Individual contributions were limited to $1,000 per candidate per election, with primary and general elections counting as separate elections.
- Individuals were limited to $25,000 per calendar year in total contributions to candidates, party committees, and political action committees (PACs).
- PACs and party committees were limited to contributing $5,000 per candidate per election.
- Candidates were limited to personal spending of $25,000 in House races and $35,000 in Senate races, a provision later struck down as unconstitutional by the Supreme Court.
- Absolute ceilings were placed on the amount that could be spent in any campaign: $70,000 for a House seat and $100,000, or eight cents per eligible voter, in the Senate. That provision was also struck down by the Supreme Court.
- Independent expenditures by nonparty committees—that is, expenditures on behalf of a candidate without the cooperation or knowledge of the candidate—were limited to $1,000 per candidate per election. That, too, was struck down by the Supreme Court.
- Political party committees, in addition to being limited in the amounts they could directly contribute to candidate campaigns, were limited in spending on behalf of their candidates to $10,000 in House campaigns and $20,000 in Senate campaigns. Both figures were indexed for inflation, and the Senate figure also allowed for adding spending based on population.[3]

3. Federal Election Campaign Act, U.S. Code, vol. 18, sec. 608. Party senatorial com-

In addition, the 1974 amendments established the presidential financing system of matching funds to candidates for amounts raised in contributions of $250 or less, established overall spending limits for eligibility to receive matching funds, and provided for public funding of major party candidates in the general election for president.

In the years surrounding the passage of the 1974 amendments to FECA, many states passed similar laws regulating the financing of state campaigns. The amendments and their state counterparts were hailed at the time as marking an end to the corrupt system of elections that the United States had used since its founding.

BUCKLEY V. VALEO

One of the more remarkable features of the decades-long effort to regulate campaign finance, which culminated in the 1974 amendments to FECA, was the almost total absence of ideological opposition to regulation.[4] Yet scarcely had FECA been enacted when a formidable ideological and constitutional challenge against it was launched in the federal courts.

In *Buckley v. Valeo*,[5] a coalition of liberals and conservatives attacked FECA as a violation of First Amendment guarantees of free speech. Restrictions on campaign contributions and spending, they pointed out, constitute restrictions on speech as surely as would a statute directly prohibiting an individual from speaking.

> Presumably dollars are not stuffed in ballot boxes. . . . The mediating factor that turns money into votes is speech. More money leads to more communications supporting the candidate. More communications sup-

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mittees were allowed to contribute up to $17,500 per candidate per election. By 1991 indexing had raised the amounts that political party committees could give to candidates to $26,500 in House races and as much as $1,166,493 for California's Senate seat. See Frank Sorauf, *Inside Campaign Finance* (New Haven, Conn.: Yale University Press, 1992), p. 10.

4. Mutch, *Campaigns, Congress, and Courts*, p. 54.
5. *Buckley v. Valeo*, 424 U.S. 1 (1976).

> porting the candidate leads to additional votes. . . . Advocacy cannot be proscribed simply because it may be effective.[6]

In a lengthy opinion, the Supreme Court agreed that campaign finance restrictions burdened First Amendment rights but declined to strike down the entire statute. Citing the government interest in preventing the “appearance of corruption,” the Court upheld restrictions on the size of campaign contributions but struck down limits on candidate spending and independent expenditures in support of a candidate. The Court held that the provision of taxpayer funds to support campaign activity could be conditioned on a candidate’s agreement to limit total campaign expenditures. It also held that Congress could require the disclosure of campaign donors’ names, addresses, and amounts contributed.[7]

The net result of the *Buckley* decision is that Congress and state legislatures can limit the amount an individual or entity can give to a campaign and can require disclosure of campaign donors and expenditures. However, Congress cannot limit the amount a campaign spends, nor can it limit the amount individuals or organizations spend on their own to support a candidate’s campaign so long as these expenditures are made independent of the campaign. It is within these limits that proposals to regulate campaign finance must operate.

In a partial dissent from the judgment in *Buckley*, Chief Justice Warren Burger warned that contribution limits would restrict the amount of political speech and have a “chilling” effect on grassroots political activity. The loss of “seed money” in the form of early, large contributions would, he argued, discriminate against many candidates. He further argued that the legislation, and in particular its provisions for public funding of presidential campaigns, would be used by incum-

6. Brief of United States p. 53, *Buckley v. Valeo*, p. 1, cited in Mutch, *Campaigns, Congress, and Courts*, p. 56.

7. *Buckley v. Valeo*, p. 1.

bents to disadvantage challengers, third parties, and independent candidates.[8]

In the twenty years since the *Buckley* decision, all of Burger's fears have been realized. However, supporters of campaign finance limitations continue to argue for still more regulation. This regulatory approach is doomed to fail, not only because the reformers have incorrectly assessed the probable results of legislation but also because they have based their legislation on faulty assumptions.

FAULTY ASSUMPTIONS OF CAMPAIGN FINANCE REFORM

John Gardner, founder of the interest group Common Cause, once stated, "There is nothing in our political system today that creates more mischief, more corruption, and more alienation and distrust on the part of the public than does our system of financing elections."[9] In a nutshell, Gardner's statement sums up the general assumptions underlying the arguments made in favor of campaign finance regulation: first, there is too much money being spent in political campaigns; second, this money has a corrupting influence, buying both votes and elections and thereby excluding ordinary citizens from the political process; and, finally, the growth in campaign spending has made the electoral process in some way less "democratic."[10] However, as Professor Frank Sorauf of the University of Minnesota, the nation's foremost commentator on campaign finance, points out, "Very few aspects of American politics better fit the metaphor of Plato's cave than the realities of American campaign finance." What most political scientists and other experts know as reality is vastly different from the "grotesque images projected onto the wall of the cave." The common public perception of the role of money is, in

8. Ibid., pp. 236–55 (Burger, J., dissenting).

9. Quoted in Fred Wertheimer and Randy Huwa, "Campaign Finance Reforms: Past Accomplishments, Future Challenges," *New York University Review of Law and Social Change* 10 (1981): 43–44.

10. Elizabeth Drew, *Politics and Money* (New York: Macmillan, 1983); Cass R. Sunstein, "Political Equality and Unintended Consequences," *Columbia Law Review* 94 (1994): 1390, 1391–92.

Sorauf's words, "difficult to square with the evidence."[11] But any rational policy discussion of campaign finance must be based on the world as it is, not on the distorted images projected onto the wall of the cave and heralded as reality by the campaign finance reformers. Close scrutiny of the assumptions underlying most campaign finance reform efforts is long overdue.

Do We Spend Too Much on Campaigns?

One often hears that too much money is spent on political campaigns.[12] Indeed, the language in which campaigns are described in the general press constantly reinforces that perception. Candidates "amass war chests" with the help of "special interests" that "pour" their "millions" into campaigns. "Obscene" expenditures "careen" out of control or "skyrocket" upward.[13] Rarely is there a dispassionate discussion of actual expenditures on politics. For the campaign finance regulators, this lack of calm discussion is a good thing. If truth be told, there is substantial reason to believe that Americans spend too little on political campaigns.

To say that too much money is spent on campaigning is to beg the question, compared to what? For example, Americans spend more than twice as much money each year on yogurt as on political campaigns.[14] As the *Washington Post* reported recently, "Close to $100 million will be spent promoting the 'Seinfeld' launch into syndicated reruns this fall—more than it costs to run a presidential campaign."[15] In the two-year election cycle culminating in November 1994, approximately $590

11. Sorauf, *Inside Campaign Finance*, p. 26.
12. One poll found that 90 percent of respondents agreed with the proposition that "there is way too much money in politics." See Terry Ganey, "To Campaign Finance Reform Advocates, the Webster Scandal Was Proof Positive," *St. Louis Post Dispatch*, October 23, 1994, p. 1B.
13. Sorauf, *Inside Campaign Finance*, p. 26, and sources cited therein.
14. George F. Will, "So We Talk Too Much," *Newsweek*, June 28, 1993, p. 68.
15. Roxanne Roberts, "The Remote Controllers," *Washington Post*, June 10, 1995, p. B1.

million was spent by all congressional general election candidates.[16] Although this set a new record for spending in congressional races, the amount is hardly exorbitant, amounting to roughly $3 per eligible voter over the two-year period. Total direct campaign spending for all local, state, and federal elections, including Congress, over the same period can be reasonably estimated at between $1.5 billion and $2.0 billion, or somewhere between $7.50 and $10 per eligible voter.[17] When one considers that money was spread over several candidates, it is hard to suggest that office seekers are spending obscene sums attempting to get their messages through to voters. By comparison, Americans spent two to three times as much money in 1994 alone on the purchase of potato chips.[18] Procter & Gamble and Philip Morris Company, the nation's two largest advertisers, spend roughly the same amount each year on advertising as is spent by all political candidates and parties.[19]

If it is hard to suggest that too much money is spent on political campaigns in some absolute sense, it may be fairly suggested that the perception that too much is spent stems from a belief that what is spent is largely ineffective. In other words, the problem, on closer examination, may not be that too much is spent but that too little benefit seems

16. As noted in "Post-Election Reports Point to New Records," *Political Finance & Lobby Reporter*, December 28, 1994, p. 1, this includes amounts spent by victorious primary candidates. An additional $76 million was spent by primary election candidates who lost.

17. The author is aware of no hard data yet compiled on state and local election spending in this cycle. Drawing from Herbert Alexander and Monica Bauer's 1991 study of 1988 spending, Sorauf estimates that total 1988 direct spending was $1.7 billion (*Inside Campaign Finance*, p.29). This figure includes approximately $370 million, or about $2 per eligible voter, spent on the presidential campaign and approximately $1.33 billion in direct spending on all other local, state, and national campaigns. If local and state spending since that time increased at the same rate as congressional spending (roughly 25 percent, according to Sorauf, *Inside Campaign Finance*, p. 30), this would yield a 1993–94 direct spending total of approximately $1.66 billion. Although this is a rough estimate, there is little reason to think that total 1993–94 spending at all levels exceeded $2 billion, and it was probably closer to $1.5 billion.

18. Clare Ansberry, "The Best Beef Jerky Has Characteristics Few Can Appreciate," *Wall Street Journal*, April 4, 1995, pp. 1, 4, cites annual spending on chips in excess of $4.5 billion.

19. Roy A. Schotland, "Proposals for Campaign Finance Reform: An Article Dedicated to Being Less Dull Than Its Title," *Capital University Law Review* 21 (1992): 429, 444.

to come out of it. Voters are tired of what they perceive as the relentless negativity of televised campaign advertisements, and they do not believe that political advertisements add significantly to their store of real political knowledge.

This perception may itself be influenced by press reporting and editorials critical of campaign advertising.[20] But whether modern, televised campaign advertising is overly negative may simply be a matter of individual voter preference. Negative advertising is popular for a simple reason: it works. Indeed, as Bruce Felknor, former executive director of the Fair Campaign Practices Committee,[21] states, "Without attention-grabbing, cogent, memorable, negative campaigning, almost no challenger can hope to win unless the incumbent has just been found guilty of a heinous crime."[22] It is a mistake to assume, as many campaign finance reformers do, that the elimination of negative campaigning would necessarily serve the public. Negative advertising that is relevant to the issues can serve the public well. Felknor notes that without negative campaigning aimed at showing up an opponent's bad side, "any knave or mountebank in the land may lie and steal his or her way into the White House or any other elective office." To suggest that candidates should not point to each other's perceived shortcomings, writes Felknor, is "preposterous."[23] Negative campaigning—that is, ef-

20. See, for example, Robin Toner, "Bitter Tone of '94 Campaign Elicits Worry on Public Debate," *New York Times*, November 13, 1994, p. 1; Stuart Elliott, "Ketchum Protests Political Ads," *New York Times*, November 10, 1994, p. D23 (quoting an advertising executive that "negative ads [are] political filth that is not advertising and shouldn't be dignified by being called advertising"); John Balzar and Doug Connor, "With Foley, Noble Era Will End," *Los Angeles Times*, November 10, 1994, p. 1 (asserting that negative ads constitute "special interest intrusion" and "the dark streak of American politics"); Charles Krauthammer, "Political Suicide," *Washington Post*, October 28, 1994, p. A27.

21. The Fair Campaign Practices Committee was a private, nonpartisan organization that sought to make public, and thereby discourage, unfair campaign tactics and advertisements. It operated from 1954 through the 1980 election, with some level of success. See Bruce L. Felknor, *Political Mischief: Smear, Sabotage and Reform in U.S. Elections* (New York: Praeger, 1992), pp. 226–34.

22. Ibid., p. 29.

23. Ibid.

forts to expose corruption, unpopular positions, or weak character in an opponent—has been prevalent in American elections since 1796.[24]

Even if one concedes that the elimination of negative advertising would be a good thing, efforts to limit spending on campaigns—either directly, through spending limits, or indirectly, through contribution limits—bear no relationship to the negativity of the campaign. Less spending only reduces the amount of communication, not any negative tone of that communication.

Increased campaign spending does translate into a better informed electorate. Gary Jacobson's extensive studies have shown that "the extent and content of information [voters] do have has a decisive effect on how they vote."[25] Voter understanding of issues clearly increases with the quantity of campaign information received.[26] In short, spending less on campaigns will not elevate the level of debate, but it will result in less public awareness and understanding of issues. This reduction in the flow of information may even make well-produced negative advertising more valuable, as candidates will need to get the maximum political mileage from each expenditure and a poorly informed electorate may be more susceptible to misleading political advertisements.

There are no objective criteria by which to measure whether "too much" is spent on political campaigns. What is spent, we might fairly say, is the amount that individuals feel is worthwhile to contribute and candidates find is effective to spend. Considering the importance of elections to any democratic society, it is hard to believe that the expenditure of less than $10 per voter for all local, state, and national campaigns every two years constitutes a crisis requiring government regulation and limitations on spending.

24. Ibid., pp. 29–44.

25. Gary Jacobson, *Money in Congressional Elections* (New Haven, Conn.: Yale University Press, 1980), pp. 31–32.

26. Stephen E. Gottlieb, "The Dilemma of Election Campaign Finance Reform," *Hofstra Law Review* 18 (1989): 213, 266.

Does Money Buy Elections?

The second assumption of campaign finance reform is that money buys elections in some manner incompatible with a functioning democracy. Of course, it is true that a candidate with little or no money to spend is unlikely to win most races. Furthermore, the candidate spending more money wins more often than not.[27] But correlation is not the same as cause and effect, and one must be careful not to make too much of such simple numbers. The correlation may stem simply from the desire of donors to contribute to candidates who are likely to win, in which case the ability to win attracts money rather than the other way around.[28] Similarly, higher levels of campaign contributions to and spending by a candidate may merely reflect a level of public support that is later manifested at the polls.[29]

Moreover, higher spending does not necessarily translate into victory. Michael Huffington, Lewis Lehrman, Mark Dayton, John Connally, and Clayton Williams are just a few of the lavish spenders who wound up on the losing end of campaigns. As Michael Malbin, director of the Center for Legislative Studies at the Rockefeller Institute of Government, explains, "Having money means having the ability to be heard; it does not mean that voters will like what they hear."[30] In the end, so long as voters have the final say among various candidates of differing views, the democratic process is well served.

Although money does not ensure election, those few studies that have attempted to quantify the effect of campaign spending on votes have found that additional spending does affect a limited number of votes.[31] The positive effect of added spending, however, is significantly

27. Herbert Alexander, *Financing Politics: Money, Elections, and Political Reform* (Washington, D.C.: Congressional Quarterly Press, 1984), p. 20.

28. Stephanie D. Moussalli, *Campaign Finance Reform: The Case for Deregulation* (Tallahassee, Fla.: James Madison Institute, 1990), p. 4.

29. Ibid.

30. Quoted in ibid., p. 9.

31. Ibid. and sources cited therein.

greater for challengers than for incumbents. In fact, studies show an inverse relationship between incumbent spending and incumbent success. Heavy spending by an incumbent usually indicates that the incumbent is in electoral trouble and facing a well-financed challenger.[32] But the incumbent's added spending is likely to have less effect on vote totals than the challenger's added spending. Thus, limits on campaign spending would hurt challengers more than incumbents. Accordingly, efforts to limit spending, whether mandatory or through incentive-based "voluntary" caps, should not be viewed as benign. Incumbent lawmakers will always have an incentive to draw campaign regulations to their advantage; commentators have noted that campaign finance legislation routinely favors the party or candidate putting forth the proposal and always favors incumbent legislators.[33]

Incumbency is already the single best predictor of electoral success. Limits on campaign financing can tend to add to political ossification. Although incumbent reelection rates have been consistently above 75 percent since the turn of the century, they have risen to record heights in this era of extensive campaign finance regulation.[34] Even in the November 1994 elections, which resulted in significant political realignment, 91.4 percent of congressional incumbents seeking reelection were victorious.[35] The Republican gains came primarily from the GOP's near sweep of "open" seats—that is, seats to which the incumbent did not seek reelection. Although money can help buy votes, it buys far more

32. Ibid., p. 5.

33. David Mason and Steven Schwalm, *Advantage Incumbents: Clinton's Campaign Finance Proposal* (Washington, D.C.: Heritage Foundation, 1993); Daniel H. Lowenstein, "On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted," *Hofstra Law Review* 18 (1989): 301, 335. See also Bradley A. Smith, "Judicial Protection of Ballot Access Rights," *Harvard Journal of Legislation* 28 (1991): 167, 212–16, for a description of how incumbent lawmakers draft electoral legislation—in this case, ballot access laws—to disadvantage challengers.

34. John H. Fund, "Term Limitation: An Idea Whose Time Has Come," *Cato Institute Policy Analysis*, no. 141 (October 30, 1990): 5.

35. Edward Zuckerman, "Money Didn't Matter for Most Challengers Who Won," *Political Finance & Lobby Reporter*, November 23, 1994, p. 1.

votes for challengers than for incumbents. This being the case, money is an equalizer in the system, helping challengers to overcome the otherwise tremendous advantages of incumbency.[36] Despite all the alarmist rhetoric, it is once again difficult to see what all the fuss is about.

Does Money Buy Votes in the Legislature?

Many Americans have come to view legislative politics as a money game. Indeed, states with few restrictions on campaign spending are frequently referred to as "pay to play" states. For many casual observers, legislative politics in the U.S. Congress can be summed up in the words of former representative Ozzie Myers (D-Pa.), who was caught on videotape taking a bribe while declaring, "Money talks, bull . . . walks!" The fact that Representative Myers was expelled from the House is often overlooked.

In fact, those who have studied voting patterns on a systematic basis are almost unanimous in finding that campaign contributions affect very few votes in the legislature. The primary factors in determining a legislator's votes are party affiliation, ideology, and constituent views and needs.[37] That has been reflected in study after study over the past 20 years.[38] Where contributions and voting patterns intersect, it is

36. Ruy A. Teixeira, "Campaign Reform, Political Competition, and Citizen Participation," in *Rethinking Political Reform: Beyond Spending and Term Limits*, ed. Ruy A. Teixeira, L. Sandy Maisell, and John J. Pitney Jr. (Washington, D.C.: Progressive Foundation, 1994), pp. 10–11.

37. Larry Sabato, "Real and Imagined Corruption in Campaign Financing," in *Elections American Style*, ed. A. James Reichley (Washington, D.C.: Brookings Institution, 1987), p. 160.

38. Moussalli, p. 6; Frank J. Sorauf, *Money in American Elections* (New Haven, Conn.: Yale University Press, 1988), p. 316; Michael Malbin, "Looking Back at the Future of Campaign Finance Reform," in *Money and Politics in the United States*, ed. Michael Malbin (Chatham, N.J.: Chatham House Publishers, 1984), p. 232; Janet Grenzke, "PACs and the Congressional Supermarket: The Currency Is Complex," *American Journal of Political Science* 33 (1989): 1. Compare W. P. Welch, "Campaign Contributions and Legislative Voting: Milk Money and Dairy Price Supports," *Western Political Quarterly* 35 (1982): 478–79, who writes, "The influence of contributions is small, at least relative to the influences of constituency, party, and ideology"; but see Lowenstein, "On Campaign Finance Reform," pp. 301, 313–22, who argues that such studies are seriously flawed.

primarily because donors contribute to candidates believed to favor their positions, not the other way around.[39]

In response to these repeated studies showing little or no "vote buying," campaign reformers generally offer a simple response: experience and human nature generally tell us that legislators, like other people, are influenced by money, even when it goes not directly to their pockets but to their campaigns. Yet the issue is not so simple, and to accept the findings of the repeated studies does not require us to check our common sense at the door.

First, people who are attracted to public office generally do have strong personal views on issues. Second, there are institutional and political incentives to support party positions. Third, money is not the only political commodity of value. For example, in 1993–94, the National Rifle Association contributed nearly $2 million to congressional campaigns through its PAC.[40] However, the NRA also has 2.8 million members "who focus intently, even solely, on NRA issues in their voting."[41] Groups advocating gun control often complain that the NRA outspends them but rarely mention that the NRA also outvotes them. Is the NRA's influence based on dollars or votes? When the NRA faced a liberal Congress and president in 1993–94, money did not gain the NRA victory over the Brady Bill or the assault weapons ban. Yet a fourth reason why campaign contributions have minimal effect on legislation is that large campaign contributors are usually offset in legislative debate by equally well-financed interests who contribute to a different group of candidates. In fact, large PACs and their parent organizations frequently suffer enormous losses in the legislative process.[42]

If campaign contributions have any meaningful effect on legislative voting behavior, it appears to be on a limited number of votes that are

39. Moussalli, *Campaign Finance Reform*, pp. 5–6.

40. "The Top 100 PACs of the 1993-94 Election Cycle," *Political Finance & Lobby Reporter*, April 26, 1995, p. 3.

41. Sorauf, *Inside Campaign Finance*, p. 166.

42. Ibid., p. 165.

generally related to technical issues arousing little public interest.[43] On such issues, prior contributions may provide the contributor with access to the legislator or legislative staff. The contributor may then be able to shape legislation to the extent that such efforts are not incompatible with the dominant legislative motives of ideology, party affiliation and agenda, or constituent views.[44] Whether the influence of campaign contributions on these limited issues is good or bad depends on one's views of the legislation. The exclusion of knowledgeable contributors from the legislative process can just as easily lead to poor legislation with unintended consequences as their inclusion.[45] But in any case, it must be stressed that such votes are few.[46]

Campaign finance reformers seem to envision a world in which career officeholders, freed from the corrupting influence of money, lobbyists, and—dare it be said?—public opinion, would produce good, wise, and fair legislation. This notion of the philosopher-bureaucrat, popular during the Progressive Era at the turn of the century, has been discredited as an unattainable and, indeed, undesirable ideal.[47] And although campaign finance reformers have long posed as disinterested citizens seeking only good government, Lillian BeVier of the University of Virginia Law School has surveyed reform efforts and found that campaign finance regulators have targeted certain types of campaign activities, "at least in part because [those activities] are closely tied to political agendas the reformers oppose."[48] In other words, the motivation for efforts to limit campaign contributions and spending may not

43. Ibid.; Sabato, "Real and Imagined Corruption," p. 160.

44. Ibid., pp. 160–61.

45. David A. Strauss, "Corruption, Equality, and Campaign Finance Reform," *Columbia Law Review* 94 (1994): 1369, 1378–79.

46. Sabato, "Real and Imagined Corruption," p. 160.

47. See, for example, Dwight Lee and Richard McKenzie, *Failure and Progress* (Washington, D.C.: Cato Institute, 1993); Geoffrey Brennan and James Buchanan, "The Normative Purpose of Economic Science: Rediscovery of an Eighteenth Century Method," *International Review of Law and Economics* 1 (1981): 155.

48. Lillian R. BeVier, "Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform," *California Law Review* 73 (1985): 1045, 1060.

be that money sways votes in the legislature but that those being elected to office reflect ideologies and voting tendencies with which many campaign finance reformers do not agree. The reformers therefore favor regulation that would tilt the electoral process in favor of preferred and, as it turns out, largely liberal candidates.

Given the popular perception otherwise, it simply cannot be stated strongly enough: no significant causal relationship has been found between campaign contributions and legislative voting patterns. In the end, just as money can buy speech but cannot ensure that voters will like what they hear, money can buy access to officials but cannot ensure that those officials will like what they hear. The safeguard is an informed voting public.

Has the Growth in Campaign Spending Altered the Democratic Nature of the Process?

The final basic assumption motivating efforts to limit campaign contributions and spending is the notion that the growth in campaign expenditures over the past thirty years has created an unequal distribution of electoral power, in which monied interests dominate the system. Like the notion that money buys elections and legislative votes, this assumption contains a kernel of truth surrounded by a heavy coating of myth.

Contrary to the image created by campaign finance reformers, there has never been a "golden age" of American politics in which money was unimportant and the poor participated on the same level as the rich. Wealth has always been important in democratic politics, and never have more than a small minority of Americans contributed to politics with their dollars.

Indeed, in early U.S. elections, most campaign expenses were paid directly by the candidates. Such expenses were relatively minimal, such as publishing an occasional campaign pamphlet and, especially in the South, treating voters to food and drink at public gatherings and rallies. Candidates did not "run" for election but "stood" for office, relying on their reputations and personal recommendations to carry them to victory. Far from being more "democratic" than current campaigns, however, elections in this early period were generally contested by candidates representing aristocratic factions before a relatively small, homogeneous electorate of propertied white men.[49]

This genteel system of upper-class politics began to change in the 1830s, when Martin Van Buren organized the first popular mass campaigns around Andrew Jackson and the Democratic Party. It was the very democratization of the process that created the need for significant campaign spending. Money became necessary not only for the traditional expenditures on food and liquor but also for advertisements, widespread pamphleteering, organization of rallies, and logistic support. Even the new, mass parties, however, obtained financing from a small number of sources. Funding for the new style of mass campaigning initially fell on those who benefited most directly from gaining and/or retaining power: government employees. Absent a professional civil service, all government employees relied on their party retaining power if they were to retain their jobs. It became common practice to assess those employees a percentage of their salaries to support the party's campaigns.

Similarly, would-be officeholders allied with the opposition served as a major source of challenger funds.[50] As late as 1878, roughly 90 percent of the money raised by the Republican congressional committee came from assessments on federal officeholders.[51] However, after the passage of the Pendleton Act in 1883, which created a federal civil service, and similar laws in the states, campaign money from assessments on officeholders began to dry up. Only then did politicians look for new sources of funds. Two dominant sources emerged: wealthy individuals and corporations.

The acceleration of northern industrialization that accompanied

49. Mutch, *Campaigns, Congress, and Courts*, pp. xvii, 7–42.
50. Ibid., p. xvi.
51. Ibid.

and followed the Civil War created the new phenomenon of large, national corporations. These corporations and government regulation grew in a symbiotic relationship. Wartime government contracts created the foundations of many a corporation, and government land and cash grants to railroad companies became common. Corporations also benefited as Republican Congresses sheltered many industries behind high tariff walls.[52] To tame the corporate power it had helped to create, in 1883 Congress created the Interstate Commerce Commission. More business regulation followed, including the Sherman Antitrust Act in 1890. State regulation of railroad rates, business competition, and working conditions became common.

With both state and federal governments claiming previously unprecedented powers to both regulate and subsidize industry, corporate America recognized the need for political participation. The goal was not to buy votes but to elect candidates supportive of corporate interests. By 1888, roughly 40 percent of Republican national campaign funds came from manufacturing and business interests. State parties were probably even more reliant on corporate funding. In the last years of the nineteenth century, Republican national chairman Mark Hanna systematized these contributions through a system of assessments on banks and corporations.[53] In 1904, corporations contributed more than 73 percent of Theodore Roosevelt's presidential campaign funds. The Democratic Party relied less on corporate contributions but was also heavily wedded to funding from the personal wealth of a handful of wealthy industrialists. Industrialist Thomas Fortune Ryan and banker August Belmont contributed roughly three-quarters of the Democrats' 1904 presidential campaign fund ($450,000 and $250,000, respectively); Henry Davis, a mine owner and the party's vice presidential candidate, contributed much of the rest.[54]

52. Daniel K. Tarullo, "Law and Politics in Twentieth Century Tariff History," *UCLA Law Review* 34 (1986): 285, 286.

53. Mutch, *Campaigns, Congress, and Courts*, p. xvii.

54. Ibid., p. 3.

In other words, contrary to the myths of campaign finance reformers, the role of the average citizen and the small contributor in financing campaigns has not been reduced over the years. For most voters, familiarizing themselves with the candidates and voting in elections have always been the extent of political involvement. Today, approximately 10 percent of Americans make a financial contribution to a political party, candidate, or PAC in an election cycle.[55] That represents a far broader base of financial support than has historically existed. Yet few would argue that it has made the political system more democratic or responsive. Just as it is a mistake to assume that reliance on a small number of contributors is necessarily undemocratic, it is a mistake to believe that large expenditures are inherently undemocratic. If, for example, we assume that reliance on numerous small contributions makes a campaign in some way more democratic, then the U.S. Senate campaign of Oliver North was the most democratic of all 1994 campaigns. Yet it was also one of the most expensive, costing nearly $20 million.[56] Despite his reliance on small donations from many people, North was roundly castigated by many campaign finance reformers for the high cost of his campaign. Yet North lost.

Unfortunately, campaign finance regulation actually limits voter choice by discouraging challengers and favoring political insiders. Neither increased campaign spending nor reliance on a small fund-raising base is inherently undemocratic. Those who seek to broaden the fund-raising base by limiting large contributions are searching for a Holy Grail that never was, and their efforts tend to make the system less democratic rather than more so.

55. Sorauf, *Inside Campaign Finance*, p. 29, citing data from the University of Michigan National Election Study.

56. According to Michael J. Malbin, "Most GOP Winners Spent Enough Money to Reach Voters," *Political Finance & Lobby Reporter*, January 11, 1995, pp. 8, 9, North spent almost $20 million on his campaign, more per eligible voter than did Huffington in California. Most of North's money was raised in small, individual contributions.

SUMMARY

The pressure for campaign finance regulation has been based on assumptions that are, at best, seriously flawed. Campaigns are not particularly costly; the total spent every two years on congressional campaigning amounts to roughly the cost of one home video rental per eligible voter. Expenditures do not buy elections; large campaign expenditures are subject to diminishing returns, especially for incumbents, which strongly suggests that heavy spending cannot buy a seat if the voters do not like the message the campaign puts out. Finally, there is no serious evidence documenting a causal link between campaign contributions and the voting patterns of elected representatives. Nevertheless, although these assumptions lack empirical support, it is on them that the American system of campaign regulation has largely been based.

This is not to suggest that money is not without its problematic aspects.[57] But the greater threat to the democratic nature of our system comes less from the growth of campaign expenditures than from ill-conceived regulation that threatens to close off electoral politics to outsiders, hinder grassroots political involvement, and trample First Amendment rights to free speech.

THE UNDEMOCRATIC CONSEQUENCES OF CAMPAIGN FINANCE REGULATION

If campaign finance regulation is founded on faulty assumptions, the continued call for additional regulation seems to be driven by a single-minded determination to ignore the consequences of such regulation on the electoral process. The goal of campaign finance reform has been to lower the cost of campaigning, reduce the influence of special interests, and open up the system. In all three aspects, the FECA amendments

57. See, for example, Frank J. Sorauf, “Politics, Experience, and the First Amendment: The Case of American Campaign Finance,” *Columbia Law Review* 94 (1994): 1348; Sunstein, “Political Equality,” p. 1390; Strauss, “Corruption, Equality, and Campaign Finance Reform,” p. 1369; Lowenstein, “On Campaign Finance Reform,” p. 301.

of 1974 appear to have been a fantastic failure. Congressional campaign spending, in constant dollars, nearly tripled between 1974 and 1992. Congressional election contributions by PACs, in constant 1992 dollars, increased from $101 million to $179 million over the same period, while the number of PACs rose from 608 to 4,268.[58] House incumbents, who in 1976 outspent challengers by a ratio of 1.5 to 1, by 1992 outspent challengers by almost 4 to 1.[59] Meanwhile, incumbent reelection rates in the House reached record highs in 1986 and 1988 before declining slightly in the 1990s.[60]

In an examination of the effects of campaign finance laws on American elections and American political life, it becomes apparent that campaign finance regulation helps close off political challenge and ossify the political system, stifles grassroots political activity, artificially constricts the political debate and the voices heard in that debate, distorts the political process in favor of the wealthy and powerful, and is ultimately incompatible with the First Amendment to the Constitution. In short, campaign finance regulation is undemocratic.

Campaign Finance Regulation Favors Incumbents

Although limits on campaign contributions increase candidate reliance on small contributors, such limits are undemocratic if by *democratic* we mean a political system that is open to challenge by outsiders and that allows challengers and those already in power to compete on relatively equal footing. The undemocratic nature of campaign finance limitations is most readily seen in the way such limitations favor incumbents over challengers.

As previously discussed, higher levels of spending tend to benefit challengers more than incumbents. Incumbents begin each election with significant advantages in name recognition. They are able to attract

58. Mason and Schwalm, *Advantage Incumbents*, p. 3.
59. Fred Wertheimer and Susan Manes, "Campaign Finance Reform: A Key to Restoring the Health of Our Democracy," *Columbia Law Review* 94 (1994): 1126, 1133.
60. Sunstein, "Political Equality," p. 1402, table 2.

press coverage because of their office, and they often receive assistance from their office staffs and government-paid constituent mailings. Through patronage and constituent favors, they can add to their support.[61] To offset these advantages, challengers must spend money. By limiting the ability of challengers to raise and spend money, campaign finance laws lock into place the advantages of incumbency and disproportionately harm challengers.[62]

Campaign finance laws also tend to favor incumbents by making it harder for challengers to raise money vis-à-vis incumbents. With campaign contribution limits, candidates cannot raise money quickly from a small number of dedicated supporters. Yet the ability to raise campaign cash from a large number of small contributors lies with those candidates who already have in place a database of past contributors and an intact campaign organization and who are able to raise funds on an ongoing basis from PACs. In other words, campaign finance limitations benefit incumbents, as shown by the escalating spending advantage incumbents have obtained since 1974.

Campaign finance laws pose a particularly high hurdle to unknown candidates because of the difficulties faced by those with low name recognition in raising substantial sums from small contributors. Contributors are less likely to give to unknowns.

However, even well-known public figures challenging the status quo have historically relied on a small number of wealthy patrons to fund their campaigns. For example, Theodore Roosevelt's 1912 Bull Moose campaign was funded almost entirely by a handful of wealthy supporters. Senator Eugene McCarthy's 1968 antiwar campaign relied on seed money from a few six-figure donors, including Stewart Mott, who gave approximately $210,000, and Wall Street banker Jack Dreyfus Jr., who may have contributed as much as $500,000. It is interesting to consider that, had the 1974 FECA amendments been in effect, it is likely that

61. Gottlieb, "Dilemma of Election Campaign Finance Reform," pp. 213, 224.
62. Jacobson, *Money in Congressional Elections*, pp. 195-96.

neither campaign would have gotten off the ground. In that case, Roosevelt would not have paved the way for Woodrow Wilson's election as president by splitting the Republican vote in 1912, and Lyndon Johnson would almost certainly have sought reelection in 1968. More recently, John Anderson would probably have had more success in his independent campaign for the presidency in 1980 had his wealthy patron, the ubiquitous Stewart Mott, been able to contribute unlimited amounts to his campaign.[63] And whereas Ross Perot's 1992 campaign was made possible by the Supreme Court's holding in *Buckley* that an individual may spend unlimited sums to advance his own candidacy, the contribution limits upheld in *Buckley* would make it illegal for Perot to bankroll the campaign of a more plausible challenger, such as Colin Powell or Paul Tsongas, in the same manner. Despite recent polls showing strong voter interest in a third-party or independent candidate for president in 1996, FECA makes a serious independent challenge by anyone other than Perot virtually impossible by limiting such a candidate's fund-raising ability.

Of course, the fund-raising disadvantage applies to challengers for all federal offices, not just the presidency. To offset the advantages incumbents have in raising funds and to secure adequate time to raise cash from small contributions, challengers must declare their candidacies at ever earlier points in the election cycle. Incumbents, in turn, resort to regular fund-raising to stay ahead of challengers. The result, in addition to record-high reelection rates for incumbents, has been an endless cycle of campaign fund-raising. In the end, the 1974 FECA amendments were something of a Faustian bargain for incumbents. In return for higher reelection rates, they are now subjected to a seemingly endless parade of fund-raisers. The weary public loses on both counts.

63. See Stewart Mott, "Independent Fundraising for an Independent Candidate," *New York University Review of Law and Social Change* 10 (1981): 135. See also Statement of Stewart R. Mott, exhibit to deposition of Stewart R. Mott, *Buckley v. Valeo*, p. 1, describing Mott's political expenditures from 1963 to 1974.

Campaign Finance Regulation Favors Special Interests over Grassroots Activity

Limitations on contributions and spending, by definition, require significant regulation of the campaign process, including significant reporting requirements as to amounts spent and sources of funds. Such regulation creates opportunities to gain an advantage over an opponent through use of the regulatory process, and litigation has now become a major campaign tactic.[64] Typically, regulation favors insiders already familiar with the regulatory machinery and those with the money and sophistication to hire the lawyers, accountants, and lobbyists needed to comply with complex filing requirements.[65] Indeed, there is some evidence that campaign enforcement actions are disproportionately directed at challengers, who are less likely to have staff familiar with the intricacies of campaign finance regulation.[66]

Perhaps those most likely to run afoul of campaign finance laws are unaffiliated individuals engaged in true grassroots activities. For example, in 1991 the *Los Angeles Times* reviewed Federal Election Commission (FEC) files and found that sixty-two individuals had violated FECA contribution limits by making total contributions of more than $25,000 to candidates in the 1990 elections. As the *Times* noted, though many of these sixty-two were "successful business people" who "usually have the benefit of expert legal advice on the intricacies of federal election laws," the next largest group of violators consisted of "elderly persons . . . with little grasp of the federal campaign laws."[67] Political involvement should not be limited to those with "the benefit of expert legal advice on the intricacies of federal election laws."

64. Moussalli, *Campaign Finance Reform*, p. 9.

65. Mott, "Independent Fundraising," p. 135.

66. See *Pestrak v. Ohio Elections Commission*, 926 F.2d 573 (1991), brief of amicus curiae American Civil Liberties Union of Ohio Foundation, at 13–16, noting that the Ohio Election Code has been enforced almost exclusively against challengers.

67. Sara Fritz and Dwight Morris, "Federal Campaign Donors' Limits Not Being Enforced," *Los Angeles Times*, September 15, 1991, p. A1.

Even more chilling is the story of Margaret McIntyre. In 1988 McIntyre, an Ohio housewife, was fined by the Ohio Elections Commission for the peaceful distribution of truthful, homemade campaign literature outside a public meeting.[68] The fine was based on a complaint brought by the assistant school superintendent in McIntyre's hometown of Westerville after a local school levy, which McIntyre campaigned against, failed on two occasions. The charges, filed months after the election, accused McIntyre of distributing anonymous campaign literature in violation of Ohio law;[69] McIntyre had signed her brochures simply "Concerned Parents and Taxpayers." After seven years of litigation, the Supreme Court finally overturned McIntyre's conviction in April 1995.[70]

The McIntyre case illustrates the manner in which campaign finance laws can trip up ordinary citizens and threaten them with years of litigation and legal fees, even if those citizens are ultimately exonerated. Significantly, immediately after the Supreme Court's decision, both the Ohio secretary of state and the state's attorney general indicated their belief that the Court's ruling does not prohibit enforcement of the law against "groups," just individuals.[71] This suggests that grassroots coalitions are still in danger whenever they engage in speech without first consulting a lawyer. Federal law and the law of every state save California contain provisions similar to that under which McIntyre was fined.

Even sophisticated interest groups have found campaign finance laws a substantial hindrance to grassroots campaign activity and voter education efforts. In 1994, for example, under threats of litigation from the FEC, both the U.S. Chamber of Commerce and the American Medical Association decided not to publish and distribute candidate endorsements to thousands of their dues-paying members. Under FEC

68. *McIntyre v. Ohio Elections Commission*, 67 Ohio St.3d 391 (1993).
69. Ibid. Federal law contains similar disclosure provisions for campaign literature.
70. *McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1511 (1995).
71. Roger K. Lowe, "Justices Strike Down Ohio Law," *Columbus Dispatch*, April 20, 1995, p. 1.

regulations, only 63 of the chamber's 220,000 dues-paying members qualified as members for the purposes of receiving the organization's political communications. Similarly, the FEC had held it to be unlawful for the AMA to distribute endorsements to some 44,500 of its members. One AMA lawyer noted that, under the circumstances, communicating endorsements to its dues-paying members was not "worth the legal risk."[72]

But if campaign finance laws, and FECA in particular, have contributed to the decline of grassroots political activity,[73] they have also favored select elites—in particular, media elites. For example, although most corporations are limited in what they may contribute to a particular campaign, newspapers, magazines, and television and radio stations can spend unlimited sums to promote the election of favored candidates. Thus, Rupert Murdoch has at his disposal the resources of a media empire to promote his views, free from the campaign finance restriction to which other persons are subjected. Donald Graham, publisher of the *Washington Post*, can run editorials and shape news coverage in favor of a preferred candidate seven days a week, as can the publishers of *Time* and *Newsweek*.[74] Rush Limbaugh and Jim Hightower can take to the airwaves daily to support their choices for public office. Yet the Supreme Court has allowed states to limit even independent expenditures by nonmedia corporations to candidate races.[75]

The increased power that campaign finance restrictions give to media elites emphasizes the fact that efforts to limit campaign spending and contributions do not eliminate inequalities in political participation. Rather, such restrictions neutralize one type of political resource,

72. Edward Zuckerman, "Speechless in DC," *Political Finance & Lobby Reporter*, November 9, 1994, p. 1.

73. Gottlieb, "Dilemma of Election Campaign Finance Reform," p. 225 n. 61, and sources cited therein.

74. For a journalist's view of this power, see Jonathan Rowe, "The View from the Hill: Government's Opinion of the Capital Press Corps," *Columbia Journalism Review* 33 (July 1994): 47.

75. *Austin v. Michigan Chamber of Commerce* 494 U.S. 652 (1990).

thereby strengthening the position of those with other, nonmonetary resources. For example, restricting the flow of money into campaigns increases the relative importance of in-kind contributions and so favors those who are able to control large blocks of manpower rather than dollars. Thus, limiting contributions and expenditures does not particularly democratize the process; it merely shifts power from those whose primary contribution is money to those whose primary contribution is time—for example, from small business to People for the American Way.

Other beneficiaries of campaign finance limitations include political middlemen: public relations firms conducting "voter education" programs on behalf of special interest groups; lobbyists; PACs such as Emily's List, which "bundle" large numbers of $1,000 contributions; and political activists. These individuals and groups may or may not be more representative of public opinion than the wealthy philanthropists and industrialists who financed so many campaigns in the past. One thing is clear, however: that campaign finance restrictions do not make the system more responsive. Efforts to ensure "equality" of inputs into the campaign process are less likely to guarantee popular control than is the presence of multiple sources of political power.[76] FECA and state campaign finance laws attempt to limit certain power bases—for example, those based on monetary contributions—but leave others intact, thereby decreasing the number of voices and increasing the power of those groups whose form of contribution remains unregulated.

By helping to entrench incumbents in office and by adding to the power of media elites and careerist political operatives, campaign finance limitations have added to the public demand for term limits and to the general public negativity toward politics and politicians.

Campaign Finance Limitations Favor Wealthy Candidates and Parties

Campaign finance restrictions have also helped create the modern phenomenon of the "millionaire candidate," of whom Michael Huffington

76. Gottlieb, "Dilemma of Election Campaign Finance Reform," pp. 271–73.

and Ross Perot are only the most celebrated examples. In the *Buckley* decision, the Supreme Court held that Congress could not limit the amount that candidates could spend on their own campaigns. Under FECA and similar state laws limiting the size of campaign contributions, however, candidates are forced to raise funds from the public in small amounts. The ability to spend unlimited amounts, coupled with FECA's restrictions on raising money, favors those candidates who can contribute large sums to their own campaigns from personal assets. A Michael Huffington, Herb Kohl, or Jay Rockefeller becomes a particularly attractive candidate precisely because personal wealth provides a direct campaign advantage that cannot be offset by a large contributor to the opposing candidate.[77]

At the same time that campaign finance restrictions help wealthy candidates, they tend to harm working-class political interests. Historically, candidates with large constituencies among poor and working-class people have obtained their campaign funds from a small base of wealthy donors.[78] If the law limits the ability of a Stewart Mott or August Belmont to finance these efforts, working-class constituencies may suffer. Their supporters simply do not have the funds to compete with other constituencies and candidates. As Stephen Gottlieb points out,

77. In 1994 Huffington spent approximately $25 million of his own fortune to run for the U.S. Senate, and by September 30, 1994, Kohl had contributed almost $4 million to his 1994 reelection effort. Edward Kennedy and Mitt Romney each loaned $2 million to their campaigns for the U.S. Senate from Massachusetts ("Senate Candidates Add $31.5 Million to Their Own Campaigns," *Political Finance & Lobby Reporter*, October 26, 1994, p. 1). According to Edward Roeder, Bill Frist of Tennessee was another big ($3.75 million) spender ("Big Money Won the Day Last November," *Cleveland Plain Dealer*, December 25, 1994, p. 1-C). (This article, incidentally, is typical of newspaper bias when reporting on campaign finance, arguing that in 1994, "the fat cats bought more elections for Republicans than for Democrats." Although Roeder does note that FECA has favored incumbents, created a cottage industry of professional middlemen, and harmed grassroots activity, his curious conclusion is that Congress should enact still more campaign finance laws.) On the House side, Republican Gene Fontenot ($2.0 million) and Democrat Robert Schuster ($1.1 million) provided the bulk of their own campaign funds (Zuckerman, "Money Didn't Matter," p. 1).

78. Gottlieb, "Dilemma of Election Campaign Finance Reform," p. 221.

"Candidates with many supporters who can afford to give the legal limit may be relatively unscathed by 'reform' legislation. As a consequence, it appears that national campaign 'reform' legislation has benefitted the wealthy at the expense of the working class."[79]

How Campaign Finance Reform Threatens the Right to Free Speech

In the eighteen years since *Buckley* was decided, the Supreme Court has struggled to develop principled limits on what Congress and the states can do to regulate campaign donations and spending. Operating within the *Buckley* framework, the Court has found all the following distinctions to be of constitutional dimension in deciding what a state may or may not regulate in the way of campaign contributions and spending:

- The right of individuals to spend unlimited amounts on their own campaign versus the right of those same individuals to contribute unlimited amounts to other people's campaigns[80]
- The right of a candidate to spend money versus the right of a contributor to give money[81]
- Contributions to a candidate versus independent expenditures in support of a candidate[82]
- Spending by ideological corporations versus spending by non-ideological corporations[83]
- Spending on ballot issues versus spending on candidate races[84]
- Contributions made from a corporation's general fund versus contributions made from a segregated corporate fund[85]

79. Ibid.
80. *Buckley v. Valeo*, p. 1.
81. Ibid.
82. *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985).
83. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).
84. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).
85. *Austin v. Michigan Chamber of Commerce*, p. 652.

- Campaign expenditures by media corporations versus campaign expenditures by nonmedia corporations[86]
- Campaign expenditures by corporations versus campaign expenditures by unincorporated entities such as labor unions[87]

In other words, the *Buckley* standard has created a doctrinal nightmare for the Court. Having conceded that Congress and the states can regulate campaign contributions and spending despite the First Amendment, the Court has been unable to define clear limits to this regulation short of the complete gutting of the First Amendment. As a result, the Court's attempted distinctions between fact situations seem less and less a matter of constitutional principle and more and more a matter of policy preference.

The problematic nature of these distinctions can be seen most vividly in the Court's 1990 decision in *Austin v. Michigan Chamber of Commerce.* In this case, the Michigan Chamber of Commerce challenged a state law prohibiting it from spending corporate funds to run a newspaper advertisement in support of a candidate for the Michigan State Senate. In an earlier decision, *FEC v. Massachusetts Citizens for Life (MCFL)*,[88] the Court had held that FECA, in requiring all corporate expenditures on campaigns to be made from a segregated fund (i.e., a PAC), impermissibly burdened the First Amendment rights of ideological corporations. The Chamber of Commerce sought to invoke MCFL to protect its right to spend funds from its general treasury in support of a candidate for office. However, the Court held that whereas MCFL was an ideological corporation, the Chamber of Commerce was not. Such a discovery would have been shocking to many Michigan lawmakers, but the Court cited as examples of the chamber's nonideological nature a seminar it held on product liability losses and lawsuits and the

86. Ibid.
87. Ibid.
88. *FEC v. Massachusetts Citizens for Life*, p. 238.

fact that the chamber, though a nonprofit organization, accepted contributions from for-profit businesses.[89]

The Court also attempted to justify the different treatment of labor unions and corporations under the Michigan law by finding that unions do not gain significant "state-conferred" advantages. Here the Court's position borders on the ludicrous, given the protection given to union members and organizers under the National Labor Relations Act and Michigan state law.[90] The Court further struggled to explain why media corporations could be exempted from the law and be allowed to expend unlimited sums from their corporate treasuries to engage in political activities. In this effort, the Court pointed to the important role of the "institutional press" in "informing and educating the public, offering criticism, and providing a public forum for discussion and debate."[91] Yet this is exactly what the chamber sought to do through independent newspaper ads in support of its favored candidate. Apparently, the Court would allow the chamber to spend unlimited sums from its corporate treasury if it purchased a newspaper or radio station but not if it simply chose to advertise with one. The notion that the state can choose certain types of individuals or organizations to serve as the approved "public forum for discussion and debate," entitled to special privileges and exemptions from the law, should be alarming to all First Amendment activists.

Historically, the most controversial First Amendment issues have centered on whether certain types of speech, such as pornography or commercial speech, or symbolic acts, such as flag burning, are protected by the amendment. What has been undisputed is that the First Amendment must protect political speech.[92] Having decided in *Buckley*, how-

89. *Austin v. Michigan Chamber of Commerce*, pp. 663–64.

90. See Michigan Statutes Annotated 17 (Callaghan 1991).

91. *Austin v. Michigan Chamber of Commerce*, p. 667.

92. Even scholars who have criticized judicial protection of pornography and other types of speech have recognized the obvious applicability of the First Amendment to political speech. See, for example, Robert Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (1971): 1.

ever, that admittedly political speech can be regulated if the state has a strong "compelling interest," the Court has left itself with no logical stopping point. There can be few state interests more compelling than the electoral process. Thus, the Court's announced test favors significant state regulation of the content of campaign speech. Yet this is precisely the type of speech that the First Amendment was most clearly enacted to protect. By emphasizing the state's interest in regulating speech, the Court has turned the First Amendment on its head. Whereas the Founders saw government regulation of political speech as a great danger to self-government, the Court sees unregulated political discourse as the threat to self-government.

FECA and its various state counterparts are profoundly undemocratic and profoundly at odds with the First Amendment.

PUBLIC FUNDING IS NOT THE ANSWER

Many have argued that the solution to the perceived evils of money in politics lies in public financing of campaigns.[93] Public financing would, it is suggested, remove the alleged corrupting influence of money, place candidates for office on equal footing, and relieve candidates of the need for constant fund-raising. In fact, public financing is unlikely to achieve these goals and raises significant problems in its own right.

Most public financing proposals are tied to limitations on the expenditure of private funds. Although the Supreme Court has held that Congress may not directly limit spending by candidates, it may link the receipt of public funds to voluntary spending limits.[94] If, however,

93. For example, see Wertheimer and Manes, "Campaign Finance Reform," pp. 1142–44; and Jamie Raskin and John Bonifaz, "The Constitutional Imperative and Practical Superiority of Democratically Financed Elections," *Columbia Law Review* 94 (1994): 1160, who argue that the Constitution requires public financing of campaigns.

94. *Buckley v. Valeo*, p. 1. However, the penalties for failing to accept "voluntary" limits may not be so steep as to amount to de facto compulsion, under the Court's doctrine of "unconstitutional conditions." For example, see Kathleen M. Sullivan, "Unconstitutional Conditions," *Harvard Law Review* 102 (1989): 1413. President Clinton's 1993 campaign finance proposal probably crossed the line on unconstitutional conditions through signif-

public financing of campaigns becomes a surrogate for spending caps, it will have the effect of favoring incumbents against challengers. This is because, as discussed above, added spending tends to benefit challengers more than incumbents. Thus, far from equalizing the field, public financing tied to spending limits will further add to incumbent advantages.[95]

In response, some political scientists have suggested that public financing should not serve to cap expenditures but rather to create a floor for them.[96] Under this theory, public financing would be used to ensure that each major party candidate has sufficient funds to run a minimally competitive race for office. Candidates could then supplement their public funds with unlimited private spending. Such an approach would avoid the disadvantages of spending and contribution limits and would perhaps help to make more campaigns competitive. However, several problems remain.

To begin with, public financing is undemocratic in a most fundamental way: it is generally opposed by the public. A December 1990 NBC News/*Wall Street Journal* poll found public funding opposed by 55 percent to 38 percent. A January 1990 ABC News/*Washington Post* poll found 31 percent opposed, 20 percent in favor, and 49 percent undecided.[97] Although some polls have shown more favorable responses to public financing,[98] the general public has also refused to support

icant penalties against candidates who did not accept the voluntary limits coupled with substantial added subsidies to their competitors. S 3, 103d Cong., 1st sess.

95. Further, incumbents will have incentives to set spending limits at a level that works in their favor. For example, as Mason and Schwalm (*Advantage Incumbents*) write, recent elections have shown that a challenger for a seat in the House must spend roughly $600,000 to have a realistic shot at defeating an incumbent (p. 10). Not surprisingly, the administration's 1993 proposal would have capped spending just at this level. See also Lowenstein, "On Campaign Finance Reform," pp. 301, 335, who notes that President Bush's 1989 campaign finance proposals would have favored Republicans.

96. See, for example, Sabato, "Real and Imagined Corruption," p. 160.

97. Sorauf, *Inside Campaign Finance*, p. 145.

98. Sorauf notes, for example, that a 1990 Greenberg/Lake poll found 58 percent in favor and 33 percent opposed. However, the same survey also showed that voters were 60

public financing at the ballot box or through tax returns; voters have defeated public financing referenda in California, Ohio, and Arizona, and fewer than 20 percent of Americans contribute to the presidential campaign fund through checkoffs on their tax returns.[99]

Public funding is undemocratic in other ways as well. As does campaign finance regulation generally, public funding favors those already in power. The presidential system, for example, automatically grants public funding for the general election and nominating convention to any party that received more than 25 percent of the vote in the previous election. New parties or independent challengers are in most cases ineligible for such funds and, in a best-case scenario, receive less money than the two major parties.[100]

Worse still, most public financing proposals call for the distribution of public funds to be tied to the candidates' popularity in opinion polls or proven fund-raising ability, as does the matching fund system used in presidential primaries. That type of public financing actually compounds funding inequalities and the benefits of prior name recognition, generally to the detriment of candidates with disproportionate support among less affluent voters.[101] For example, a $500 contribution to Bill Clinton would yield $500 in matching funds; a $20 contribution to Jesse Jackson would yield just $20 in matching funds. Yet the alternative—making funds available regardless of proven support—is unappealing to most Americans.

Indeed, even when disbursement of funds is tied to some measure of popular support, it is likely that public funds will also flow to those

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percent to 29 percent against public financing when told that it would result in taxpayers paying for negative advertising (*Inside Campaign Finance*, p. 145). See also Russ Hemphill, "Public Rejects Paying for Campaigns," *Phoenix Gazette*, September 22, 1993, p. B3, who reports that 75 percent of voters polled opposed public financing.

99. Sorauf, *Inside Campaign Finance*, p. 141. Minnesota's state checkoff system also has participation rates below 20 percent (ibid., p. 143).

100. Elizabeth Rada, David Cardwell, and Alan Friedman, "Access to the Ballot," *Urban Law* 13 (1981): 793, 808.

101. Gottlieb, "Dilemma of Election Campaign Finance Reform," p. 223.

on the fringes of American politics. For example, Lenora Fulani of the ultraleft New Alliance Party received nearly $3 million in public funding over the course of the 1988 and 1992 presidential elections,[102] although her level of public support never reached even 1 percent. Perennial presidential candidate and convicted felon Lyndon LaRouche took in a cool $825,000 in taxpayer-provided matching funds in 1988 alone.[103] As far back as 1777, Thomas Jefferson wrote, "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[104] This is true when the money goes to Bob Dole and Bill Clinton; that taxpayers are forced to fund Lyndon LaRouche and Lenora Fulani as well only drives the point home.

Finally, public financing is expensive at a time of ongoing deficit spending by government. For example, the provision of $300,000 in public funds, the minimum needed for an effective campaign, to each of 870 candidates for the U.S. House of Representatives would cost more than $260 million per congressional election. Add in senatorial candidates, funding for primary candidates, or funding for third-party and independent candidates, and the amounts go higher still. Given that the shortage of challenger funds could be largely resolved by repealing contribution limits already in effect, public financing appears to be a serious boondoggle.

CONCLUSION

Efforts to regulate campaign finance, in particular, the Federal Election Campaign Act, have been based on mistaken assumptions about the role of money in politics and on the mistaken belief that eliminating or reducing money will in some way make the process more fair, the playing field more level. In fact, spending on political campaigns is hardly extravagant, amounting to only a few dollars per eligible voter every

102. Mason and Schwalm, *Advantage Incumbents*, p. 13.
103. Sorauf, *Inside Campaign Finance*, p. 138, table 5.1.
104. Thomas Jefferson, "A Bill for Establishing Religious Freedom," in *The Portable Thomas Jefferson*, ed. Merrill D. Peterson (New York: Viking Press, 1975), p. 252.

two years. Because there is no a priori correct allocation of political advantages, including money, efforts to control this one feature of the political landscape have tended to have serious detrimental side effects, including the entrenchment of incumbents and the stifling of new, alternative political choices. FECA and its state counterparts have served to limit grassroots political activity and to enhance the power of campaign professionals and insiders. Overall, campaign finance regulation has served to make the political process less open and less democratic.

Moreover, efforts to limit campaign contributions and expenditures run directly counter to the assumptions of the First Amendment. The First Amendment was based on the belief that political speech is too important to be regulated by the government. Campaign finance laws operate on the directly contrary assumption—that campaigns are so important that speech must be regulated. The result has been a series of Supreme Court decisions making largely arcane, questionable distinctions between different types of entities, campaigns, and campaign activities. These decisions are hard to justify under the First Amendment and have clearly limited the opportunities for Americans to engage in what at least one sitting justice has recognized as "core political speech."[105]

After nearly twenty-five years, FECA has done nothing to change the alleged evils that led to its adoption. This suggests either that the evils are inevitable, if not beneficial, or that the solution to the alleged problems must lie elsewhere—in measures such as term limitations, abolition or modification of legislative seniority and pension systems, or other structural reforms from which Congress has shied away.

In short, the solution to the alleged problems of campaign finance is far simpler than the arcane web of regulations that leads to citizens being fined for distributing homemade leaflets, to trade groups being prohibited from communicating with their members, and to personal

105. Roger K. Lowe, "High Court Takes Up Westerville Woman's Case," *Columbus Dispatch*, October 13, 1994, p. 1, quoting Justice O'Connor.

wealth serving as an indicator of a viable political candidate. The solution is to recognize the flawed assumptions of the campaign finance reformers, dismantle FECA and the FEC bureaucracy, and take seriously the system of campaign finance regulation that the Founders wrote into the Bill of Rights: “Congress shall make no law . . . abridging the freedom of speech.”